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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

NICK SEVANO, Petitioner, vs. ARTISTIC PRODUCTIONS, INC., Respondent.	No. TAC 8-93 DETERMINATION OF CONTROVERSY

BACKGROUND

The above-captioned petition to determine controversy pursuant to Labor Code § 1700.44 was filed on December 12, 1992 by NICK SEVANO, seeking a determination as to (1) whether the one year statute of limitations set forth at Labor Code § 1700.44(c) bars ARTISTIC PRODUCTIONS, INC. ("API") from asserting, as a defense in a pending court action brought by SEVANO to enforce the provisions of a contract between the parties, that said contract is void on the ground that it violates the Talent Agencies Act (Labor Code sections 1700, et seq.), and (2) whether the contract does, in fact, violate the Act.

An evidentiary hearing was conducted in Los Angeles, California on March 7, April 4, May 9, and July 18, 1995, before the undersigned attorney specially designated by the Labor

Commissioner to hear this matter. Petitioner was represented by Richard Ferko, and Respondent was represented by Lee Sacks. Due consideration having been given to the testimony, documentary evidence, and arguments presented, the Labor Commissioner hereby adopts the following Determination.

FINDINGS OF FACT

1. API is the exclusive loan out corporation for Julia Migenes Johnson (hereinafter "Migenes"), an internationally acclaimed opera singer. Migenes is the only performer whose services are loaned out by API, and API's receipts are entirely derived from Migenes' entertainment industry earnings. At all relevant times, Migenes has been the president of API.

2. At all relevant times, SEVANO and Migenes have been residents of the State of California. The contract between API and SEVANO, referred to herein, was entered into and performed in the State of California.

3. On December 6, 1985, Migenes entered into an agreement with International Creative Management, Inc. ("ICM"), a talent agency licensed by the State Labor Commissioner, under which ICM agreed to serve as her exclusive talent agency in the area of motion pictures, television and concert engagements. Migenes terminated ICM's services in late 1987.

4. In February 1986, Migenes hired Maria Martone to serve as her "manager", a job previously handled by Migenes' former husband. Among her other duties, Martone was expected, pursuant to Migenes' express request, to help find employment opportunities for Migenes. As compensation for her services, Martone was to be paid 15% of Migenes' professional earnings.

5. Shortly after starting work as Migenes' "manager", Martone spoke to SEVANO about the possibility of having him join as her partner in "managing" Migenes' career. Martone was impressed with SEVANO's entertainment industry background and believed that he could use his contacts to find film and television work for Migenes. In her discussions with SEVANO, Martone informed him that her responsibility was to try to find work for Migenes. After viewing a performance tape highlighting Migenes' talents, SEVANO stated that he was certain he could find film and television work for her. In February 1986, during his first meeting with Migenes, SEVANO promised to "work very hard to get [her] the role of Evita" in the planned film to be based on the Broadway musical, and offered to speak to the producers, whom he said he knew very well. SEVANO stated that he was now "semi-retired," but that he had represented other performers, including Lindsay Wagner, for whom he had "negotiated a tremendous contract." Wishing to broaden her career and obtain work in film and television, convinced that ICM was not aggressively soliciting producers on her behalf, persuaded by Martone that SEVANO's entertainment industry background and contacts would lead to greater employment opportunities, and very interested in obtaining the role of 'Evita', Migenes decided to hire SEVANO to join with Martone as her "managers."

6. Neither SEVANO nor Martone has ever been licensed by the State Labor Commissioner as a talent agent. SEVANO, understanding that a "manager" who tries to find employment for an artist must be licensed as a talent agent, suggested to Martone that they could "get around the conflict between managers and agents" by

entering into an agreement with API under which they would become API corporate officers. By structuring his relationship with Migenes in that manner, SEVANO believed that he would not be subject to talent agency licensing requirements. At SEVANO's suggestion, API's attorney drew up a written contract, executed on March 7, 1986, under which SEVANO and Martone were hired by API to serve as "executive vice presidents" for a period of five years, to "guide and supervise the career of Julia Migenes Johnson," for which SEVANO and Martone were to receive compensation in the form of commissions equal to 15% of the gross income received by API from Migenes' entertainment industry earnings. It was understood that SEVANO and Martone would share equally in these commissions, with each to receive 7.5% of Migenes' earnings.

7. The contract was amended in writing on June 24, 1986 to make commissions payable for SEVANO and Martone on gross income earned pursuant to the extension, modification, or renewal of any agreements entered into during the course of SEVANO and Martone's employment, irrespective of whether they are still employed by API when the extension, modification, or renewal is executed.

8. Shortly after commencing his employment with API, Sevano initiated a wide range of efforts to procure employment for Migenes. Indeed, little evidence was presented to indicate that SEVANO was responsible for anything other than obtaining new employment for Martone. In his testimony, SEVANO repeatedly denied that he was responsible for procuring employment for Migenes, and instead asserted that his only role was to "counsel Migenes and guide her career." SEVANO's characterization of his role is belied by the contrary credible and unbiased testimony of

Maria Martone, by the fact that SEVANO lacked the background to counsel or guide Migenes with respect to her career as an opera singer, and that as to her career in movies and television, without the procurement activities of SEVANO and Martone, there would barely have been any career to "guide". In short, the evidence presented leaves little doubt that the overwhelming bulk of SEVANO's specific activities as an "executive vice president" for API consisted of efforts to obtain employment for Martone. These efforts included:

a. Initiating meetings with a number of movie and television producers and executives, in order to (in SEVANO's own words) "advertise [Migenes'] talents" and "make them aware of her availability." At these meetings, SEVANO distributed copies of Migenes' resume and videotapes of her recent appearance on '60 Minutes.'

b. Initiating discussions with the producers of the movie 'Evita' in an ultimately unsuccessful attempt to secure the lead role for Migenes.

c. Meeting with Lou Alexander and Howard Storm, producers at Lorimar, and with producers at MTM Productions, in an attempt to obtain television work for Migenes.

d. Meeting with the producers of Las Vegas shows, obtaining an engagement for Migenes as the opening act for George Burns in Las Vegas.

e. Obtaining appearances for Migenes on a number of television shows, including 'Webster,' 'Nothing Is Easy,' a Perry Como variety show, and the Merv Griffin show.

f. Obtaining employment for Migenes as the lead in a

Broadway musical entitled 'Rags.'

g. Along with Maria Martone, meeting with Menahem Golan, the producer of the film 'Three Penny Opera,' in a successful effort to procure a role for Migenes in that film. The actual terms of Migenes' contract for her services on that film were negotiated by George Hayums, an attorney representing API. Hayums was not then licensed as a talent agent by the California Labor Commissioner.

h. Along with Maria Martone, meeting with Emiliano Piedra, the producer of the film 'Berlin Blues,' and negotiating the details of Migenes' role in the film and the terms of her compensation.

i. Along with Maria Martone, obtaining work for Migenes on commercials for 'Sara Lee' and 'Nutragena', and negotiating the terms of the contracts for her work on those commercials.

j. Along with Maria Martone, obtaining a lead role for Migenes in the Disney film 'Ciro', and negotiating the terms of Migenes' compensation for her work on that film.

9. Migenes' talent agency, ICM, played no role in setting up these meetings or in the ongoing discussions with these producers. SEVANO was not acting in conjunction with, at the request of, or pursuant to the direction of anyone from ICM in connection with these activities. In his testimony, SEVANO asserted that ICM was involved in procuring or attempting to procure many of the engagements listed above. But SEVANO's account of ICM's role was contradicted by Maria Martone's convincing testimony. Moreover, SEVANO's testimony was wracked by inconsistencies (for example, in cross-examination he was unable to name a single engagement ICM

had procured or attempted to procure in 1986). Also, SEVANO failed to present any sort of evidence to corroborate his account of ICM's activity - - no documentation nor any testimony from one of ICM's agents. And finally, some of the above-listed procurement activities (such as the meetings with the producer of 'Three Penny Opera') took place following the termination of ICM's services.

10. Throughout the entire period of SEVANO's employment as an "executive vice president" for API, SEVANO was actively engaged in the representation of a number of television and movie scriptwriters, for which he was paid commissions out of the proceeds earned by these writers for the sales of their scripts. SEVANO conducted all of his business out of his own office, including all business on behalf of API, as API did not have its own office.

11. On June 27, 1988, API terminated SEVANO's employment. Martone made this decision because of her dissatisfaction with SEVANO's performance, and her belief that SEVANO violated his fiduciary obligations by convincing her to retain the services of Jeffrey Kruger as her European concert "booking agent," without disclosing that he was a part-owner of Kruger's business.

12. On July 20, 1990, SEVANO filed a demand for arbitration against Migenes, seeking the recovery of commissions allegedly owed pursuant to his agreement with API. On April 4, 1991, SEVANO dismissed his claim against Migenes, and refiled it against API.

13. An arbitration hearing took place in April 1992, and on May 4, 1992 the arbitrator issued an award in favor of SEVANO for unpaid commissions in the amount of 7.5% of the gross income

received by API from Migenes' services in the entertainment industry during the period from March 7, 1986 to March 6, 1991, and during the period of any extensions, modifications, or renewals of any agreements that had been entered into during the period from March 7, 1986 to March 6, 1991. The arbitrator made an express finding that the contract between SEVANO and API did not violate the California Labor Code.

14. On August 20, 1992, the Los Angeles Superior Court denied SEVANO's petition to confirm the arbitrator's award and instead, granted API's motion to vacate the award, on the ground that the contract between the parties violated the Talent Agencies Act and was therefore void *ab initio*, and unenforceable. The court decision stated that SEVANO "contracted to be a talent agent for Migenes and, indeed, he conducted himself at all times as an agent for her. The contract language is a clear subterfuge to allow SEVANO and Martone to act as talent agents for Migenes without securing a license for that occupation." The court noted that the Talent Agencies Act prohibits any person not licensed as a talent agent from procuring, offering, promising, or attempting to procure employment or engagements for an artist, and that under Buchwald v. Superior Court (1967) 254 Cal.App.2d 347, an unlicensed agent's contract to represent an artist is void and unenforceable, and that an arbitration conducted under the provisions of such a contract is likewise void and unenforceable.

15. On October 5, 1992, SEVANO moved the superior court for a new trial on the grounds that: a) API waived any right to challenge the validity of the contract under the Talent Agencies Act by failing to assert this defense within one-year of SEVANO's

filing of the demand for arbitration, and b) the Labor Commissioner has original and exclusive jurisdiction to hear and determine all controversies under the Talent Agencies Act. The court denied the motion for a new trial, but modified the orders that had been issued on August 20, 1992 by changing the order denying SEVANO's petition to confirm the arbitration award to a "denial without prejudice to renew," and changing the order granting API's motion to vacate the award to a "denial without prejudice to renew."

16. API then filed a motion for reconsideration of the order denying its motion to vacate the arbitration award. On November 20, 1992, the court granted the motion for reconsideration and entered a new order, granting API's motion to vacate the arbitration award on the ground that jurisdiction to resolve the controversy as to whether SEVANO's unlicensed status rendered the contract void rested with the Labor Commissioner rather than the arbitrator, and that once API raised the defense of illegality, the arbitrator exceeded his authority by proceeding with the matter and issuing an award.

17. Following the issuance of this order vacating the arbitration award, SEVANO filed the instant petition with the Labor Commissioner. On November 1, 1993, the Labor Commissioner, finding that only legal issues were present and no factual disputes requiring an evidentiary hearing existed, issued a determination of controversy in favor of API without a hearing. SEVANO filed objections, contending that a hearing was necessary to resolve various factual matters that were not contained in the petition. Specifically, SEVANO argued that 1) the Labor

Commissioner failed to consider the significance of API's stipulation, in its arbitration brief, that the statute of limitations set forth at Labor Code section 1700.44(c) applies to this dispute, and 2) by determining this controversy without a hearing, he was denied the opportunity to present evidence and testimony that he did not procure employment for Migenes. On August 30, 1994, the Labor Commissioner entered an order vacating the previously issued determination, and scheduling this controversy for hearing.

LEGAL ANALYSIS

1. Migenes is an "artist" within the meaning of Labor Code section 1700.4(b). The Labor Commissioner has jurisdiction to determine this controversy pursuant to Labor Code section 1700.44(a).

2. Labor Code section 1700.44(c) provides that "no action or proceeding shall be brought pursuant to [the Talent Agencies Act] with respect to any violation which is alleged to have occurred more than one year prior to the commencement of this action or proceeding." Here, neither API nor Migenes has brought any action or proceeding against SEVANO. Rather, these proceedings were initiated by SEVANO's filing of a demand for arbitration, followed by his filing of a motion to confirm the arbitration award, and finally, his filing of a petition to determine controversy before the Labor Commissioner. API raised the issue of SEVANO's unlicensed status purely as a defense to the proceedings brought by API to enforce the purportedly illegal contract.

3. A statute of limitations is procedural, that is, it only affects the remedy, not the substantive right or obligation. It

runs only against causes of action and defenses seeking affirmative relief, and not against any other defenses to an action. Neither the statute of limitations nor the doctrine of laches operates to bar the defense of illegality of a contract, and in any action or proceeding where the plaintiff is seeking to enforce the terms of an illegal contract, the other party may allege and prove illegality as a defense without regard to whether the statute of limitations for bringing an action or proceeding has already expired. See 3 Witkin, California Procedure 4th, 'Actions', pp. 512, 532. We thus conclude that the one year limitations period set forth at Labor Code section 1700.44(c) does not bar API from asserting the defense of illegality of the contract on the ground that SEVANO acted as a talent agent without a license.

4. In a brief filed in the course of the arbitration proceedings, the attorney then representing API stated that "[t]he Labor Commissioner does not have original jurisdiction over the instant dispute as Labor Code §1700.44 contains a one-year statute of limitations within which to bring [a] dispute before the Labor Commissioner." (Respondent's Arbitration Brief, dated January 27, 1992, page 7, fn. 3.) It is, of course, well established that in "controversies arising under the [Talent Agencies] Act . . . the Labor Commissioner has original jurisdiction to hear and determine the same as to the exclusion of the superior court, subject to an appeal within 10 days after determination, to the superior court where the same shall be heard de novo." Buchwald v. Superior Court, supra, 254 Cal.App.2d 347, 359. And as noted above, the statute of limitations contained at Labor Code section 1700.44

does not bar a defendant or respondent from asserting a purely defensive matter regardless of whether the running of the statute of limitations would have barred such party from using that matter as the basis of a cause of action for affirmative relief. Moreover, this Arbitration Brief appears to have been filed within one year of the date that SEVANO filed his demand for arbitration against API, and thus, the statute of limitations had not yet run on any cause of action that may then have been filed by API for affirmative relief. Thus, the statement made at footnote 3 in Respondent's Arbitration Brief is incorrect, as a matter of law. As an incorrect statement of law, it is to be accorded no significance. And insofar as it may be viewed as a "stipulation", to the extent it purports to prevent a competent tribunal from hearing this matter, it just as objectionable and ineffective as an attempt to confer jurisdiction by consent. See, 2 Witkin, California Procedure 4th, 'Jurisdiction', pp. 547-548. We therefore conclude that this purported "stipulation" does not deprive the Labor Commissioner of jurisdiction to hear and determine the instant controversy.

5. Labor Code section 1700.5 provides that "no person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner." Labor Code section 1700.4(a) defines "talent agency" as "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist," and further provides that a talent agency "may, in addition, counsel or direct artists in the development of their professional careers."

The term "procure", as used in this statute, means "to get possession of: obtain, acquire, to cause to happen or be done: bring about." Wachs v. Curry (1993) 13 Cal.App.4th 616, 628. Thus, under Labor Code section 1700.4(a), "procuring employment" is not limited to soliciting employment or initiating communications with producers leading to employment. Rather, under the statute, "procuring employment" includes negotiating for employment, and entering into discussions with a producer concerning potential employment, notwithstanding the fact that the producer may have been the person who initiated the discussions or negotiations. See Hall v. X Management, Inc. (1992) TAC No. 19-90, pp. 29-31. Of course, even using the restricted definition of the term "procure" to mean "to solicit" as advocated by SEVANO, Respondent committed numerous violations of the Talent Agencies Act. But the definition of procuring employment is not limited to mere soliciting of employment or the initiating of contacts with potential employers as SEVANO contends. If all SEVANO had done was to respond to calls from potential employers by referring those calls to Migenes or to ICM, then SEVANO would not have "procured employment" within the meaning of the Act. But the evidence leaves no doubt that this is not what happened. Rather, on those occasions when a producer initiated the contact with SEVANO, as did the producers of the Merv Griffin show and the Perry Como show, SEVANO negotiated with those producers to obtain those engagements for Migenes.

6. In Buchwald v. Superior Court, supra, 254 Cal.App.2d 347, 351, the court held that because "the clear object of the [Talent Agencies] Act is to prevent improper persons from becoming [talent

agents] and to regulate such activity for the protection of the public, a contract between an unlicensed [agent] and an artist is void." Buchwald involved a dispute between the musical group 'Jefferson Airplane' and their "personal manager." The parties' written agreement stated that the manager had not agreed to obtain employment for the group and that he was not authorized to do so. The group alleged that, despite the contractual language, the manager had in fact procured bookings for them. In seeking to avoid the licensing requirement, the manager argued that the written agreement established, as a matter of law, that he was not subject to the Act's requirements. The court rejected that contention, stating, "The court, or as here, the Labor Commissioner, is free to search out illegality lying behind the form in which a transaction has been cast for the purpose of concealing such illegality. [citation.] The court will look through provisions, valid on their face, and with the aid of parol evidence, determine that the contract is actually illegal or is part of an illegal transaction."

7. For years following the Buchwald decision, in cases before the Labor Commissioner, the Commissioner interpreted the Talent Agencies Act to require licensure even where the procurement activities are only incidental to the agent's duties and obligations. (See e.g., Derek v. Callan (1982) TAC No. 18-80; Damon v. Emler (1982) TAC No. 36-79.) This approach was disapproved by the appellate court in Wachs v. Curry (1993) 13 Cal.App.4th 616, 628, as follows:

"[T]he occupation of procuring employment was intended to be determined according to a standard that measures the significance

of the agent's employment procurement function compared to the agent's counseling function taken as a whole. If the agent's employment procurement function constitutes a significant part of the agent's business as a whole, then he or she is subject to the licensing requirement of the Act even if, with respect to a particular client, procurement of employment was only an incidental part of the agent's duties. On the other hand, if counseling and directing the clients' careers constitutes the significant part of the agent's business, then he or she is not subject to the licensing requirement of the Act, even if, with respect to a particular client, counseling and directing the client's career was only an incidental part of the agent's overall duties."

In response to the Wachs decision, the Labor Commissioner, in Church v. Brown (1994) TAC 52-92, formulated a new standard for determining whether licensure is required: "The Wachs court declined to quantify the term "significant", finding that it was not necessary in that case. Since the term "significant" does not appear anywhere in the statute, adoption of regulations designed to quantify the term would be impossible." However, in order to apply the Wachs decision, the Labor Commissioner had no choice but to define the term "significant". The Commissioner concluded that "conduct which constitutes an important part of the relationship would be significant. . . . [P]rocurement of employment constitutes a 'significant' portion of the activities of the agent if the procurement is not due to inadvertence or mistake and the activities of procurement have some importance and are not simply a ***de minimis*** aspect of the overall relationship between the

parties when compared with the agent's counseling functions on behalf of the artist."

Under the test enunciated in Church v. Brown, an artist who "asserts a licensing violation under the Act satisfies his burden if he establishes . . . a contractual relationship with the [putative talent agent] and that [such] relationship was permeated and pervaded by procurement activities undertaken by the [agent]. Such a showing supports an inference that these activities were a significant part of the [agent's] business as a whole, and suffices to establish a *prima facie* case of violation of the Act. At that point, the burden shifts to the respondent to come forward with sufficient evidence to sustain a finding that the procurement functions were not a significant part of the [agent's] business" *vis-a-vis* the agent's counseling function.

8. More recently, in Waisbren v. Peppercorn Productions, Inc. (1995) 41 Cal.App.4th 246, the appellate court undertook an exhaustive review of the legislative history of the Talent Agencies Act, noting that in 1982 the Legislature created the California Entertainment Commission to "study the laws and practices of this state, the State of New York, and other entertainment capitals of the United States relating to the licensing of agents . . . so as to enable the commission to recommend to the Legislature s model bill regarding this licensing." On December 2, 1985, the Commission submitted its Report to the Legislature and the Governor. In this Report, the Commission concluded that "[n]o person, including personal managers, should be allowed to procure employment for an artist in any manner or under any circumstances without being licensed as a

talent agent." The Commission reasoned: "Exceptions in the nature of incidental, occasional or infrequent activities relating in any way to procuring employment for an artist cannot be permitted; one either is, or is not, licensed as a talent agent, and if not so licensed, one cannot expect to engage, with impunity, in any activity relating to the services which a talent agent is licensed to render." (Report, p. 19-20) Although the Commission concluded that the Act should remain unchanged with respect to requiring a license for any procurement activities (incidental or otherwise), the Commission did recommend statutory changes on other matters. In response, the Legislature adopted all of the Commission's recommendations, and the Governor signed them into law. In accordance with the Commission's advice, the Legislature did not alter the requirement of a license for persons who occasionally procure employment for artists.

The Waisbren court reasoned that "by creating the Commission, accepting the Report, and codifying the Commission's recommendations in the Act, the Legislature approved the Commission's view that . . . the Act imposes a *total* prohibition on the procurement efforts of unlicensed persons." The court then held that "we conclude, as did the Commission, that the Act requires a license to engage in *any* procurement activities." Waisbren v. Peppercorn Productions, supra, 41 Cal.App.4th at 258-259.

The Waisbren court correctly observed that the precise issues before the Wachs court were whether the Act's use of the term "procure" was so vague as to violate due process, and whether the exemption for procurement activities relating to recording

contracts constitutes an equal protection violation. In its discussion of the method to be used for determining whether a person is engaged in the "occupation" of procuring employment, and by focusing on the "significance" of the putative agent's procurement function as the determinative factor, the Wachs court went far beyond the issues presented by the parties in that case. Thus, the Waisbren court reasoned: "Given *Wachs's* recognition of the limited nature of the issue before it, we regard as dicta the court's interpretation of the term "occupation" and its statement that the Act does not apply unless a person's procurement function is significant. Because the *Wachs* dicta is contrary to the Act's language and purpose, we decline to follow it. In that regard, we note that *Wachs* applied an overly narrow concept of "occupation" and did not consider the remedial purpose of the Act, the decisions of the Labor Commissioner, or the Legislature's adoption of the view (as expressed in the California Entertainment Commission's Report) that a license is necessary for incidental procurement activities. Thus we conclude that the *Wachs* dicta is incorrect to the extent that it indicates that a license is required only where a person's procurement activities are 'significant.'" (Id. at p. 261.)

Waisbren sharply criticized the Wachs focus on whether the procurement activities constitute a "significant part" of the agent's business as unworkable. "Because the court expressly declined to say what it meant by "significant part", the import of its discussion on this point is unclear." (Id. at p. 260) "Perhaps a personal manager's procurement activities should no longer be considered 'incidental' when they exceed 10 percent of

his total business. Or perhaps the line should be drawn at 25 or 50 percent. We simply cannot make this determination because the Act provides no rational basis for doing so. Moreover, even if we could somehow justify using a particular figure, it would be virtually impossible to determine accurately whether a personal manager had exceeded it." (Id. at p. 255)

9. The Waisbren decision is well reasoned and persuasive on the issue of whether a license is required for incidental or occasional procurement activities. Its analysis of the dicta in Wachs leaves little doubt that the contrary views expressed by that court are in basic conflict with the Act's remedial purpose and legislative history. In cases where this question is presented, the Labor Commissioner will follow the holding of the Waisbren decision; the "significance" of the putative agent's procurement function is not relevant to a determination of whether a license is required. To the extent that the Labor Commissioner's earlier determination in Church v. Brown (1994) TAC 52-92 is inconsistent with the Waisbren decision, it is hereby overruled.

10. Because the hearing in this matter took place after the Wachs decision but prior to the Waisbren decision, a great deal of testimony was devoted to the question of whether SEVANO's employment procurement activities constituted a significant part of his business as an "executive vice president" for API. The evidence presented leaves no doubt that SEVANO promised to procure employment for Migenes, offered to procure employment for Migenes, attempted to procure employment for Migenes, and that he procured employment for Migenes. Indeed, these procurement activities were

so pervasive and continuous, and there was so little credible evidence presented by SEVANO to indicate that these employment procurement functions were not a significant part of his business, that even if this case were being decided under the now overruled test set forth in Church v. Brown, we would have to conclude that SEVANO violated the Act by engaging in these activities without having been licensed as a talent agent. A similar conclusion obviously flows from the application of the stricter Waisbren standard.

11. SEVANO cannot rely on Labor Code section 1700.44(d) as a means of avoiding the licensing requirement. That subsection provides that "[i]t is not unlawful for a person or corporation which is not licensed pursuant to this chapter to act in conjunction with, and at the request of a licensed talent agency in the negotiation of an employment contract." The overwhelming weight of the evidence establishes that SEVANO's employment procurement activities were not undertaken at the request of any licensed talent agent, and that these activities were not limited to the negotiation of contracts for employment on jobs already procured by a licensed talent agent.

12. SEVANO cannot rely on the fact that he was ostensibly employed by API as an "executive vice president" as a means of avoiding the licensing requirement. Following Buchwald, the fact that the contract between API and SEVANO appears on its face not to violate the Talent Agencies Act is obviously not dispositive. Rather, we must look at the parties' relationship and activities in their entirety in order to determine whether the contract was designed as a subterfuge to evade the Act's requirements. And it

is evident from the surrounding circumstances that the "employment agreement" between SEVANO and API was a nothing more than a clever, albeit transparent, attempt to allow SEVANO to act as a talent agent without securing a license. SEVANO understood the need for a license and specifically advised Martone that by structuring their relationship with API in the manner he proposed, they could obtain employment for Migenes without being licensed. The only reason that SEVANO was hired by API was so that he could try to find work for Migenes. SEVANO's only responsibilities as a corporate officer were to "guide and supervise" Migenes' career, and, though obviously not stated in his contract, to procure employment for Migenes. These functions are exactly those that may be performed by a talent agent pursuant to Labor Code section 1700.4(a). Indeed, there is nothing that SEVANO did during his ostensible employment as an "executive vice president" for API that falls outside the typical duties of a talent agent. Moreover, the manner in which SEVANO performed these services - - devoting some portion of his time and efforts to representing artists other than Migenes, and working in his own office, rather than an API corporate office - - is characteristic of the manner of operations of a talent agent, not a corporate officer. Finally, the manner in which SEVANO was compensated for these services - - in the form of commissions based on a percentage of Migenes' entertainment industry gross earnings, rather than by salary - - typifies the manner of compensating a talent agent, not a corporate officer. In short, the overwhelming reality behind the contract was that SEVANO was hired to engage in, and did engage in, the occupation of a talent agent.

13. SEVANO cannot rely on the fact that the contract for his services as an "executive vice president" was drafted by API's attorney as a means of avoiding the licensing requirement. Initially, we note that it was SEVANO himself who devised the plan to characterize his position in this manner, and that he did so specifically in order to evade the licensing requirements of the Talent Agencies Act. Moreover, there was no evidence presented to indicate that Migenes then had any awareness that a person who procures employment for an artist must be licensed, or that she understood that the "executive vice president" position was merely a subterfuge. But even if Migenes and API's attorney had been active and knowing participants in SEVANO's scheme, that would not excuse SEVANO from the consequences of his violation of the law. "Since the clear object of the [Talent Agencies] Act is to prevent improper persons from being [talent agents] and to regulate such activity for the protection of the public, a contract between an unlicensed [talent agent] and an artist is void. . . . And as to such contracts, artists, being of the class for whose benefit the Act was passed, are not to be ordinarily considered as being *in pari delicto*." Buchwald v. Superior Court, supra, 254 Cal.App.2d 347, 351. In short, an artist cannot consent to a violation of the licensing requirement of the Talent Agencies Act. The purpose of the licensing requirement is to protect all artists, and that purpose would be defeated by allowing a talent agent to enter into an agreement with an individual artist, or that artist's loan-out company, to permit the agent to procure employment for the artist without a license.

14. SEVANO cannot rely on the fact that his contract was

with API, rather than with Migenes, as a means of avoiding the licensing requirement. SEVANO's contract with API was nothing more than a clever device to obtain compensation for the very activities for which a license is required, that is, the activities of procuring, offering, attempting and promising to procure employment for Julia Migenes. API was merely the legal entity through which Migenes provided her artistic services to the buyers of those services. We are unaware of any precedent allowing for the enforcement of a contract between an unlicensed talent agent and an artist's loan-out company when the very same contract would be found void *ab initio* if it were between the agent and the artist. To allow SEVANO to escape the consequences of his unlawful activity and to enforce his purported right to compensation under his contract with API would exalt form over substance, and would suggest a disturbing means of evading the licensing requirement of the Talent Agencies Act. The purpose of this licensing requirement is to protect artists, and one of the means of doing that is to deny enforcement of <u>any</u> contract under which the agent would be compensated for unlawful procurement activities. "The courts generally will not enforce an illegal bargain or lend their assistance to a party who seeks compensation for an illegal act." <u>Lewis & Queen v. N.M.Ball Sons</u> (1957) 48 Cal.2d 141, 150. Thus, the fact that SEVANO contracted with API rather than with Migenes is immaterial; the contract violates the Talent Agencies Act and is void *ab initio*.

15. It is well established that "[i]f the agreement is void no rights, including the claimed right to private arbitration, can be derived from it. . . .[T]he power of the arbitrator to

determine the rights of the parties is dependent upon the existence of a valid contract under which such rights might arise." Buchwald v. Superior Court, supra, 254 Cal.App.2d 347, 360. Because SEVANO's contract with API is void *ab initio*, the arbitrator who purported to determine the merits of SEVANO's claim against API pursuant to the contract's arbitration provision acted without jurisdiction. The arbitration award is therefore invalid and cannot be enforced.

ORDER

For all of the reasons set forth above, IT IS HEREBY ORDERED that:

1. The one year statute of limitations at Labor Code section 1700.44(c) does not bar API from asserting the defense of illegality in any court action or Labor Commissioner proceeding brought by SEVANO to enforce the provisions of the contract between the parties; and

2. As a consequence of SEVANO having engaged in the occupation of a talent agent, within the meaning of Labor Code section 1700.4(a), without having been licensed therefor as

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required by Labor Code section 1700.5, the contract between SEVANO and API is unlawful and void *ab initio*. SEVANO has no enforceable rights under that contract.

Dated: 3/20/97

MILES E. LOCKER
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: 3/20/97

JOHN C. DUNCAN
Chief Deputy Director
DEPARTMENT OF INDUSTRIAL RELATIONS

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS - DIVISION OF LABOR STANDARDS ENFORCEMENT

CERTIFICATION OF SERVICE BY MAIL
(C.C.P. §1013a)

(NICK SEVANO v. ARTISTIC PRODUCTIONS, INC.)
(TAC 8-93)

I, MARY ANN E. GALAPON, do hereby certify that I am employed in the county of San Francisco, over 18 years of age, not a party to the within action, and that I am employed at and my business address is 45 Fremont St., Suite 3220, San Francisco, CA 94105.

On March 21, 1997, I served the following document:

DETERMINATION OF CONTROVERSY

by placing a true copy thereof in envelope addressed as follows:

RICHARD T. FERKO, ESQ.
SALOMONE, RAPP & FERKO
20700 Ventura Boulevard, Suite 328
Woodland Hills, cA 91364-2398

LEE SACKS, APC
FILOMENA E. MEYER, ESQ.
SACKS & ZWEIG
100 Wilshire Boulevard, Suite 1300
Santa Monica, CA 90401

and then sealing the envelope with postage thereon fully prepaid, depositing it in the United States mail in the city and county of San Francisco by ordinary first class mail.

I certify under penalty of perjury that the foregoing is true and correct. Executed on March 21, 1997, at San Francisco, California.

Mary Ann E. Galapon
MARY ANN E. GALAPON

CERTIFICATE OF SERVICE BY MAIL